APPENDIX A

REPLACEMENT LANGUAGE
OF
BLACKHAWK ENERGY SERVICES, L.L.C.

1. The following language should be added on page 17 of the Proposed Order before the heading "E. WPS' Position":

E. Blackhawk's Position

Blackhawk maintains that the Commission should enter an Order consistent with its prior Orders approving ARES certification requests. According to Blackhawk, the Commission established an analysis to assess whether an applicant met the requirements of Section 16-115(d)(5) in the original WPS proceeding. (Blackhawk brief at 3.) Blackhawk asserts that in Docket No. 01-0174 the Commission addressed the reciprocity issue and confirmed the approach that the Commission originally accepted for WPS. Blackhawk contends that the Commission should not abandon its previously-established policy without providing a reasoned analysis to support a new position. Blackhawk states that Staff witness Larson not only stands behind his original analysis and conclusion that WPS is in compliance with the Act, but also believes that the reciprocity provision has been properly applied to other ARES applicants. (Blackhawk brief at 4, citing Tr. at 70-71.)

~~E~~ **F. WPS' Position**

2. The Section entitled "V. Commission's Conclusions" at pages 23-28 should be revised as follows:

V. COMMISSION'S CONCLUSIONS

On April 18, 2000, an Order was entered by the Commission in Docket 00-0199 which granted, subject to certain conditions, an ARES certificate to WPS for the service territories of ComEd and three other electric utilities. The Commission granted rehearing, but other parties chose not to participate, and the original decision was affirmed on July 6, 2000.

As explained in the Order of April 18, 2000, Applicant is an affiliate of Wisconsin Public Service Corporation ("WPSC") in Wisconsin, and Upper Peninsula Power Company in Michigan. These two affiliates own and control electric transmission and distribution facilities for public use and for delivery of electricity to end users in defined geographic regions in Wisconsin and Michigan. Neither of the affiliate's electric

service territories are open to retail electric competition and customer choice at this time. Hence the reciprocity provisions of Section 16-115(d)(5), which are set forth in the instant Order above, come into play. In this context, the Order of April 18, 2000 reasoned that the question is whether electric power and energy "can be physically and economically delivered" to the service areas of Applicant's affiliates by the Illinois utilities in whose service territories the Applicant plans to offer service.

On March 16, 2001, the Commission entered an Order Reopening Proceeding in 00-0199 to consider and determine, on an expedited basis, whether it should rescind, alter or amend the Order it entered on April 18, 2000, with the scope of the reopening limited to further consideration of whether WPS meets the [reciprocity] standards set forth in Section 16-115(d)(5) of the Act.

The Order of March 16, 2001 also found (on pages 3-4) that in proceedings relating to ARES certifications, "The law does not prohibit the Commission from entertaining evidence or arguments from parties other than the applicant." Thus, the proceeding on reopening was open to participation by other interested parties. A number of parties have in fact participated on reopening, and have made a number of contributions to the record in this case, despite continuing objections from WPS that such parties should not be permitted to be heard.

With regard to the **meaning or intent of the reciprocity provisions** of Section 16-115(d)(5), and the criteria set forth therein, the positions of the parties are summarized above and will not be repeated in detail here. The IBEW concludes, "Based on the foregoing facts demonstrating that one way retail competition will be injurious to the rates of return of the two Illinois utilities in whose territory WPS has petitioned for certification as an ARES and the language of Section 16-115(d)(5) making reciprocity the law of the State without the exemptions alleged by WPS and determined to be present in the 1997 Act by the Commission in its Order in Case No. 01-0174, the Commission in the present case should deny WPS' petition for ARES certification." (IBEW brief at 8-9)

Representatives Granberg, Novak and Persico, and Senator Jacobs ("Joint Legislator Intervenors"), who formally intervened in this case, assert that Section 16-115(d)(5) bars any out-of-state power company, or its in-state affiliates, from selling or marketing electricity in the Illinois electricity market without equivalent concessions. They further contend that the Commission's interpretation of the reciprocity provisions in its April 18, 2000 Order in this proceeding is inconsistent with the General Assembly's intent.

Senator Rauschenberger, on the other hand, contends that the principle of reciprocity set forth in Section 16-115(d)(5) is not an absolute prohibition on ARES affiliation with non-open, non-Illinois utilities. In his view, it would make no sense to apply the reciprocity provision with respect to denial of ARES certification for an affiliate

of a utility in a location that could not be physically served by the power and energy from the Illinois utility.

According to **Blackhawk and** WPS, the plain language in Section 16-115(d)(5) specifically provides that if power and energy cannot be physically and economically delivered by Illinois utilities to the T&D system of the applicant or its affiliate, then the application may not be barred on the basis of non-compliance with the reciprocity provisions of Section 16-115(d)(5) regardless of whether the affiliate provides delivery services comparable to those offered by Illinois utilities.

In arriving at a decision on the issue of the meaning and intent of the reciprocity provisions of Section 16-115(d)(5), the Commission observes that this question was very recently considered by the Commission in the Blackhawk proceeding, Docket No. 01-0174. In its order entered April 6, 2001, the Commission granted Blackhawk's application for an ARES certificate over the objections of the IBEW, who intervened, and Representatives Granberg and Novak, who also intervened and were referred to as Joint Intervenors. In rejecting the arguments of the IBEW and Joint Intervenors on page 22 of the Order in Blackhawk, the Commission found, in part, "The Commission rejects Joint Intervenors' and the IBEW's position since it is contrary to the plain language of Section 16-115(d)(5)." The Commission added, "Joint Intervenors' and the IBEW's interpretation would render meaningless the qualifying term 'physically and economically delivered'."

Having reviewed the arguments of the parties in the instant case, the Commission notes that the interpretation of Section 16-115(d)(5) advanced by the Joint Legislator Intervenors and the IBEW is essentially similar to the position that was argued by them and rejected by the Commission on April 6, 2001 in Docket 01-0174. Based on its analysis of the record in this case and the decision in Docket 01-0174, the Commission continues to believe that the Intervenors' interpretation, although well articulated in their comments and briefs, is contrary to the plain language of Section 16-115(d)(5) and would afford no meaning to the qualifying term "physically and economically delivered". Accordingly, their interpretation should not be adopted in the instant docket. Rather, the proper standard, as indicated in the Blackhawk order, is whether ComEd, IP, CIPS and CILCO can physically and economically deliver power and energy to the service areas of WPS' affiliates, and this issue is addressed below.

As indicated in the Commission's Order in the Blackhawk proceeding in Docket 01-0174, and in the conclusions in the instant order above, the question to be answered by the Commission at this time is **whether electric power and energy "can be physically and economically delivered"** to the service areas of WPS' affiliates by the Illinois utilities whose service areas are the subject of WPS' application.

Based on the information presented in the original WPS proceeding, the Commission found in its Order of April 18, 2000 that it would not be economical, under any of the three analytical methods presented, for the Illinois utilities in question to

deliver electric power and energy to the service areas of Applicant's affiliates. Accordingly, the Commission concluded that the reciprocity provisions of Section 16-115(d)(5) did not preclude the Applicant from receiving an ARES certificate.

On reopening, as discussed above, Staff observed that the WPS analyses calculated three different estimated costs for service by Illinois utilities to the service areas of WPS' affiliates, and then compared such costs to the "average cost" charged by the WPS affiliate to all industrial users. Staff asserted that because WPSC's retail rates contain demand charges, varying customer load factors can result in varying rates. Staff stated that ComEd's wholesale power costs do not vary as greatly with load factor as WPSC's retail costs because the retail costs include a demand charge while the wholesale costs do not.

In Staff's view, the average rate concept used by WPS does not properly consider the interplay of demand charges and customer load factors. Therefore, in its analysis on reopening, Staff "considered the impact on other than the average customer of WPSC." Staff believes its economic analysis demonstrates that ComEd, IP, CIPS and CILCO can economically serve some of WPSC's Cp-1 customers with load factors less than the class average.

WPS **and Blackhawk** criticized the Staff analysis, primarily because Staff assumed that the cost for Illinois utilities to serve WPSC customers does not vary with load factor. WPS presented economic analyses in which both the WPSC rates and the cost for Illinois utilities to serve WPSC customers vary with load factor. WPS contends that its analyses demonstrate that no Illinois utility can economically serve WPSC customers. **WPS and Blackhawk also criticized the Staff Report for basing its analysis on a hypothetical subgroup of customers.**

As noted above, Staff's analysis assumes that wholesale power costs do not vary with load factor to the extent retail costs do, because the wholesale costs do not include a demand charge. WPS **and Blackhawk** disputes this assumption by Staff. WPS claims that its survey of power suppliers indicates that the wholesale cost of supplying a customer with a lower load factor was greater than the wholesale cost of supplying a customer with a higher load factor.

The Commission notes that Staff's position on this issue, including the key assumptions in Staff's rationale, is essentially the same as that advanced by Staff in Docket No. 01-0174. In that proceeding the Commission concluded on page 22 of its Order:

> The basic premise for the analysis contained in Staff's Report is that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs. This basic premise, however, is simply not true.

That order went on to state on pages 22-23:

> The Commission accepts Blackhawk's premise that the cost of wholesale electric power varies hourly, depending upon many factors, including: weather, units in service, and current fuel costs. Firm wholesale electric power products are priced to reflect these variations in costs. Staff's analysis in its Report fails to recognize this fact. While it is common for wholesale electric power contracts to not contain demand charges, the Commission notes that there has been no demonstration that any contracts have restrictions on load factor. Firm wholesale electric power contracts typically address the issue of load factors in one of several ways, including: a separate demand charge; a requirement that electric power is taken at a specified load factor (wholesale electric power is commonly sold in 100% load factor blocks for the on-peak hours of the period under contract, such as electric power purchased on the basis of the Cinergy Index.); or requiring that the purchaser take electric power within a specified range of load factors.

As observed above, the basic rationale for the Staff position in the instant proceeding, including the key assumptions, is essentially the same as that presented by Staff and rejected by the Commission in Docket No. 01-0174. Here, as in that proceeding, the Commission finds the basic premise of Staff's economic analysis -- that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs -- is not supported by the record.

Having reviewed the record in this proceeding, the Commission concludes that WPS has demonstrated that at the present time, it would be uneconomical for ComEd, IP, CIPS and CILCO to deliver power and energy to the retail customers of WPSC. The Commission believes that at the present time, WPS is in compliance with the reciprocity provisions of Section 16-115(d)(5) of the Act. Therefore, the Commission affirms the previously granted certificate and concludes this proceeding on reopening. The Commission also observes that under 83 Illinois Administrative Code 451.730, WPS is required to annually certify its compliance with the requirements of Section 16-115(d)(5) of the Act.

Before leaving this issue, the Commission wishes to make one other comment. In its analysis on reopening, the Staff, on short notice, provided the Commission with a well-explained alternative approach for the Commission's consideration in reaching a decision on the issue of economic delivery. So even though the Commission has not accepted the Staff methodology in the Blackhawk order or in this one, the Commission notes that Staff's analysis on reopening was of benefit in enabling the Commission to make an informed decision on this difficult issue.

Finally, the Commission will address arguments regarding the Commission's **authority to reopen this proceeding**, as well as those pertaining to due process. As explained above, WPS filed a motion to set aside the order reopening the proceeding. WPS asserts that the Commission does not have the authority to enter the March 16, 2001 Order Reopening Proceeding, or to revisit or question the certification of WPS in the manner proposed. WPS also argues, among other things, that the Commission failed to provide WPS with procedural due process because the Commission failed to comply with Section 16-115B, because persons and parties were improperly permitted to intervene and submit comments, and because an expedited schedule was used in this proceeding. Fellow ARES Blackhawk and Enron join WPS in some of these arguments. On the other hand, both Staff and IBEW assert that the Commission has the authority to undertake this reopened proceeding and that it was conducted in an appropriate manner.

The **Commission now recognizes that** Commission's Order Reopening Proceeding ~~has already disposed of~~ **improperly addressed** several of these issues. For example, the Order Reopening Proceeding at pages 3 to 4 contains the Commission's rationale explaining why it is appropriate to consider input from entities other than just the applicant, and that rationale is hereby ~~reaffirmed~~ **reversed**. **Upon reviewing the plain language of the Act, it is clear that proceedings pursuant to Section 16-115 are to be based solely upon the application and other information provided by the applicant. The Commission recognizes that this provision of the Act is unique in the way in which the General Assembly has directed the Commission to proceed. Nevertheless, if the Commission or any party believes that an ARES is in violation of the provisions of Section 16-115(d), the procedure is clearly set forth that a complaint should be filed pursuant to 16-115B of the Act. Likewise, if the Commission intends to initiate a rulemaking relating to Section 16-115(d)(5), it will do so in accord with Section 16-115(f).** On this point, the Commission ~~finds it interesting that~~ **now understands why** WPS would argue so passionately about the importance of due process while simultaneously strongly criticizing the Commission for allowing any other parties to participate in the process in any manner whatsoever. **In both situations, WPS is merely requesting that the Commission follow the requirements in the Act.**

With regard to the Commission's authority to reopen the case**, WPS and Blackhawk appropriately criticize** the bases for exercising such authority ~~are~~ **as** explained in the Order Reopening Proceeding and in Staff's responses to WPS' motion. **As discussed above, such proceedings should be initiated pursuant to the procedural requirements set forth in the Act.** ~~Furthermore~~ **Nevertheless**, the Commission observes that ARES have an obligation to "continue to comply with the requirements for certification stated in subsection (d) of Section 16-115." (220 ILCS 5/16-115A(a)(ii)) In addition, 83 Illinois Administrative Code 451.710 states in part:

> All ARES shall continue to remain in compliance with the provisions of the Act and this Part, as now or hereafter amended. If an ARES received a

> certificate before the effective date of any provision of this Part, which provision applies to applicants seeking certification to serve customers with the same electrical demand or usage characteristics as the ARES, the ARES must demonstrate that it has come into compliance with such provision no later than January 31 of the year following the year during which such amendment took effect.

Moreover, Section 451.730, entitled "Certification of Compliance with Section 16-115(d)(5) of the Act", expressly provides that the ARES "shall annually certify that it complies with the requirements of 16-115(d)(5) of the Act . . . . "

Clearly, both the statute and the Commission's rules require an ARES to continue compliance with applicable certification provisions, including the reciprocity provisions. ~~In any event~~ **However**, the Commission concludes that this proceeding was **not** properly reopened, and that WPS' "motion to set aside" is ~~denied~~ **granted**.

With regard to due process concerns, the Commission notes that WPS received, among other things, the notice and order of reopening **contrary to the procedures outlined in the Act**, notice of a hearing **that was scheduled so quickly that WPS could not conduct appropriate discovery**, a copy of the Staff Report **that Staff had seven (7) days to prepare**, an **"**opportunity to respond**"** to the Staff Report **a mere forty-eight (48) hours after receipt**, a copy of the Staff reply **that was not contepmplated under the original schedule** and an opportunity to respond to it, an opportunity to file motions **that were all denied or not explicitly ruled upon**, an opportunity to offer scheduling proposals **that were summarily dismissed despite the explanation from the attorneys for WPS that they had scheduling conflicts** and comment on those offered by others, an opportunity to present evidence **that it was given only hours to prepare** and to cross-examine **only** the Staff witness **even though other adverse witnesses were allowed to submit comments**, an opportunity to file a post-hearing brief addressing all issues raised by any party **that again was required to be filed on an expedited basis for no apparent reason**, and an opportunity to file exceptions to the proposed order **a mere seven (7) days after being served with the proposed order** and replies to exceptions submitted by other parties **forty-eight (48) hours later**. All things considered, the Commission believes that WPS' due process rights were ~~not~~ compromised in this proceeding. **The process employed in this proceeding should not be duplicted.**